



# Legal aspects of working with children of separated parents

**T**he provision of psychological services to children is made more complex by matters of informed consent and the rights of young people, and is further compounded when the parents of a child are separated. The APS Professional Advisory Service frequently receives enquiries from psychologists in relation to legal obligations when working with children of separated parents, indicating that this is a complex area that causes anxiety and uncertainty.

In this article the APS legal advisor, **Jeanette Jifkins**, provides some responses to questions raised by psychologists delivering services to children whose parents are separated. Assistance may also be sought from the *APS Guidelines for working with young people* which can be downloaded by members from the APS website at [www.psychology.org.au/Assets/Files/EG-Young-People.pdf](http://www.psychology.org.au/Assets/Files/EG-Young-People.pdf).

For the purposes of this article, a child is considered to be a young person under the age of 18, and the 'client-parent' or 'presenting parent' is the parent who has brought the child to receive psychological services.

### At what age is a child deemed old enough to see a psychologist without requiring parental consent? If considered old enough, can the child make decisions about treatment in the absence of the parents?

There is no specific age at which children are deemed capable of making decisions without parental consent. Consider that in Australia a child of 15 can obtain an independent Medicare card (and bulk billed medical services), the criminal justice system deals with children between the ages of 10 and 18 as juveniles, and the Family Court may take into consideration the wishes of a child under the age of 10 in certain circumstances.

When it comes to providing psychological services, whether or not parental consent is required is based upon the understanding and intelligence level of the child, not his or her age. As part of the process of obtaining informed consent from a child, a psychologist should determine whether the young person has the capacity to make an informed choice and can understand:

- the nature of the proposed psychological service
- the benefits and risks of the proposed psychological service
- the consequences of receiving or not receiving the proposed psychological service, and
- the limits to confidentiality.

A young person with an intellectual disability may be capable of giving informed consent if they are assessed as meeting the above criteria.

### Is the consent of both parents required before a young child can be treated?

A psychologist is under no legal obligation to seek the consent of both parents prior to providing services to a child, although the

consent and involvement of both parents is desirable. However, there are situations where obtaining the consent of both parents may not be possible or appropriate.

If the psychologist is informed by the parent who has provided consent that the other parent would not agree to the treatment of the child, it is not the psychologist's responsibility to do anything further in consulting with the other parent. If parenting orders are in place and the parents are in dispute as to whether or not the child should receive psychological services, the psychologist may request that the parents resolve that dispute via the court process prior to agreeing to provide services.

### Are those with custody but not guardianship of a child (such as foster/kinship carers) able to provide consent for a child to see a psychologist?

A person may have legal responsibility for a child whether or not a court order declaring that responsibility is held. Generally speaking, foster parents and close kin are more likely than not to have a legal responsibility for the care of a child.

Where a psychologist is concerned that the child is unable to provide informed consent to treatment, and that treatment may not be in the best interests of the child, the psychologist may seek legal advice as to the status of the carer's responsibility for the child or decline to provide psychological services to the child.

### Is a psychologist required to notify the other parent if a child has been brought for treatment by one parent and both have legal custody?

No. The psychologist is entitled to assume that the presenting parent has the requisite responsibility to bring the child for treatment. Notification to the other parent of the fact of treatment may constitute a breach of privacy if made without the appropriate consent.

However, there are a number of factors that the psychologist may consider in relation to this, and may choose to discuss with the presenting parent and the child (if appropriate) prior to agreeing to provide psychological services. These include the relationship between the parents, the child's wishes, the child's relationship with the other parent, whether the child is likely to discuss the psychological consultation with the other parent, whether the child will be required by the presenting parent to keep the consultation 'secret', and the implications if the secret is unintentionally divulged. The psychologist's decision should be guided by what is in the best interests of the child.

### What if one parent wants the child to be seen but the other parent stipulates that the child is not to attend treatment?

Disputes between parents are the responsibility of the parents and of the Family Court. If a psychologist is concerned that a dispute between the parents may compromise or have an adverse impact



on the treatment of the child, the psychologist may request that the parents resolve that dispute prior to agreeing to work with the child, or otherwise refuse to treat the child, depending on what is consistent with the child's best interests.

### **How much information can be given to the 'non-client' parent about the child if it is requested?**

No information can be provided without consent. Either the child, if capable, provides informed consent to disclosure, or the presenting parent provides the information, or the court orders that information must be provided. Mere acknowledgment by the psychologist that the child is a client may be a breach of privacy if made without consent, so care must be taken.

### **Are both parents legally allowed to have access to a child's records of treatment, even if one didn't provide consent for the treatment? What if the child has explicitly asked that the other parent not be told about the content of sessions?**

The same answer for the previous questions holds here – no information can be provided without consent unless a court has ordered the information to be released.

### **Can a report that is believed to be in the child's best interests be provided to both parents even if the parent that provided consent has asked that the other parent not receive any information about the child's attendance?**

Disclosure of personal health information requires informed consent. In the case of a child, the determining factor is for the psychologist is to decide who is required to provide consent. Where a child is not capable of providing consent for him or herself, then the client-parent must be consulted. If the child is capable of providing informed consent, then the child should be consulted. If a court orders the disclosure of a report to both parents, then the report must be disclosed. If a psychologist has been appointed by the court and creates a report as part of court proceedings, it may be possible for the psychologist to recommend to the court that the report be provided or disclosed to both parents despite the objection of one of the parents.

### **What powers do government departments (e.g., Department of Community Services) and courts have in seeking the records of children where the parents have not consented to the release of the file?**

Child protection legislation has a significant impact upon the powers and responsibilities of different government departments with regard to access to information about children, particularly children at risk. Some legislation empowers an agency to obtain information without a court order.

Each State and Territory has different legislation. Any psychologist concerned about access to information (rather than whole files) about a child should contact the agency responsible for making the request to clarify that agency's legislative powers, and if not satisfied, seek independent legal advice. Note that agencies may also obtain a subpoena from a court for access to information, and a subpoena is an order that a psychologist must comply with.

### **What are the obligations if a court has directed a psychologist to determine whether a child can stay overnight with a non-custodial parent?**

Psychologists may have different responsibilities depending upon the role they play in any Family Court proceedings. A psychologist may be appointed by the Family Court as a family consultant, or may have individuals or families referred for counselling or dispute resolution.

If a psychologist is appointed as a family consultant, then all communications with the parties to the Family Court proceeding are not confidential and may be used in Court. The Court may request a report from the family consultant on specific or general matters related to the proceeding. If directed to provide a report, the family consultant must prepare an objective report that assists and advises the Court. The family consultant must take all reasonable steps to be informed about all pertinent information necessary to properly complete the report. ■

*The information provided in this article is general and does not replace the need to obtain independent legal advice in specific situations. Please note that the APS is unable to provide legal advice, nor is the APS legal advisor available to answer specific queries. Enquiries regarding professional matters should be directed to the APS Professional Advisory Service by telephoning or emailing the APS National Office.*

Advertisement

#### **FUNDAMENTALS OF EMOTIONALLY-FOCUSED THERAPY FOR COUPLES**



**Presenter:** Dr Veronica Kallos-Lilly, Director of the Vancouver Couples and Family Institute, Canada.  
**November 14 to 17, 2011, 9AM to 5PM.**  
**Venue:** Staff Club, University of Queensland, St Lucia Campus, Brisbane. Max 40 participants.  
Early bird by 03.10.11, \$890; thereafter \$950

Register online at  
[www.psychology.org.au/Events/EventView.aspx?ID=8263](http://www.psychology.org.au/Events/EventView.aspx?ID=8263)

